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IN THE

Supreme Court of the United States

October Term, 1960.

No. 164.

WILLIAM H. BURTON,
Plaintiff-Appellant,

v.

THE WILMINGTON PARKING AUTHORITY
and
EAGLE COFFEE SHOPPE, INC.,
Defendants-Appellees.

APPELLEE THE WILMINGTON PARKING AUTHORITY'S BRIEF.

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Defendants-Appellants.

JURISDICTION.

Appellee, The Wilmington Parking Authority, hereinafter called "Authority", pursuant to Rule 16 of the Revised Rules of the Supreme Court of the United States, has heretofore moved that the appeal be dismissed and/or that the judgment of the Supreme Court of the State of Delaware be affirmed on the grounds that the decision below was not in favor of the validity of a Delaware statute under the Constitution, treaties or laws of the United States; and that the question presented is so unsubstantial as not to need further argument. Authority's contentions in this behalf are hereinafter made.

STATEMENT OF THE CASE.

Without excepting to Appellant's statement of the case, Authority states that the facts material to the consideration of the questions presented are as follows. Appellant was denied service, solely on account of his race, in the restaurant operated by appellee Eagle Coffee Shoppe, Inc., hereinafter called "Eagle", as lessee of a portion of a public parking facility in Wilmington, Delaware, owned and operated by Authority.

Authority's motion for summary judgment, upon which it prevailed below, and the supporting affidavits, took no exception to the material allegations of the verified complaint and appellant's supporting affidavits, excepting for certain matters averred in paragraphs 7 and 8 of the complaint (R2-3).[1] Paragraph 7 avers that Authority refused service to appellant through its instrumentality, Eagle. Paragraph 8 avers that such refusal was in pursuance of a policy adopted, consented to and acquiesced in by Authority. These averments are denied. Authority averred that its relation to Eagle is defined, in its entirety in the agreement of lease (R13 et seq.) and that it therein appears as a matter of law that Eagle is not Authority's instrument.

The material allegations of the complaint (R1-4) which are admitted are as follows. Authority is a body corporate and politic of the State of Delaware exercising public powers of the State as an agency thereof. Its statutory purpose is to furnish off-street parking to the public. Eagle is a private Delaware corporation in the restaurant business. It occupies a portion of Authority's facility pursuant to the aforesaid lease. The lease, among others, was necessary to finance the facility. The site of the facility was purchased by funds donated by the City of Wilmington. Construction was financed through revenue bonds delivered

1. Reference is to Transcript of Record, pp. 2-3.

on Authority's sole credit.[2] To make the bonds saleable, rental income from long-term leases was required in addition to parking revenues. Eagle furnished its own finishings, fixtures and equipment. The lease reserves no control in Authority over Eagle policies respecting patrons. The lease does provide that Eagle "shall occupy and use the leased premises in accordance with all applicable laws, statutes, ordinances and rules and regulations of any federal, state or municipal authority". In fact, Authority has never directed or ratified any Eagle policy (R11-13).

SUMMARY OF ARGUMENT

1. The opinion below does not depend upon the determination of the validity of a state statute under the Constitution, treaties or laws of the United States. Rather, the opinion depends upon the conclusion, bottomed upon undisputed facts, that as a matter of law, Eagle was not an agency of the State of Delaware.

2. The Fourteenth Amendment to the United States Constitution is not applicable to the acts of Eagle because it carries on its business independent of any control by the State of Delaware. The acts of Eagle as respects appellant and members of his class are private acts in pursuance of a private business. The relationship of Authority and Eagle as landlord and tenant is insufficient to constitute the latter the former's agent. The relationship of appellees in its entirely is defined by their certain agreement of lease,

2. 22 Del. C. § 504(c) expressly provides Authority shall not "pledge the credit or taxing power of the State of Delaware or any political subdivision, nor shall any of its obligations be deemed to be obligations of the State of Delaware, or of any of its political subdivisions, nor shall the State of Delaware or any political subdivision thereof be liable for the payment of principal or of interest on such obligations."

ARGUMENT.

I.

This Court Is Without Jurisdiction.

This is an appeal from the judgment of the Supreme Court of the State of Delaware, reversing the judgment of the Court of Chancery of the State of Delaware in and for New Castle County. As recited above, appellant was denied service solely on account of his race in the restaurant operated by Eagle as lessee of a portion of Authority's public parking facility in Wilmington, Delaware. Appellant prayed declaratory and injunctive judgment requiring Authority and Eagle to furnish restaurant services to him and persons of his race.

The opinion of the Supreme Court of the State of Delaware, dated January 11, 1960 (R42-54), discloses that the conclusions of the Court do not depend upon a determination of the validity of Title 24, Delaware Code, Section 1501, under the Constitution, treaties or laws of the United States. The opinion depends, rather, upon the conclusion that Eagle was not an agency of the State of Delaware. Appellant seeks to establish his right to appeal under the provisions of Title 28, United States Code, Section 1257(2) and to this end predicates the opinion below upon a determination of the validity of the State statute in question. Authority believes that the language of the Delaware Supreme Court so far as it concerns Section 1501 aforesaid is collateral to the primary and dispositive determination that upon the undisputed facts Eagle was not Authority's agent.

Section 1501 aforesaid provides:

"§ 1501. Exclusion of customers; definition

No keeper of an inn, tavern, hotel or restaurant, or other place of public entertainment or refreshment of

travelers, guests, or customers shall be obliged by law, to furnish entertainment or refreshment to persons whose reception or entertainment by him would be offensive to the major part of his customers, and would injure his business.

As used in this section, 'customers' includes all who have occasion for entertainment or refreshment."

The Court below makes it clear that it bottoms its opinion, not upon the ground that Eagle is a restaurant keeper entitled to privileges afforded by Section 1501, above, but upon the conclusion that Eagle's discrimination was not State action. The text of the opinion so states in express terms (R53-54):

"We think the Authority and through it, the State of Delaware does not operate, either directly or indirectly, the business of Eagle; has not located the business of Eagle within the facility for the convenience and service of the public using the parking service; and has not financially enabled the business of Eagle to operate. The only concern the Authority has with Eagle is the receipt of rent, without which it would be unable to afford the public the service of off-street parking. This circumstance, we think, is not sufficient to make the discriminatory act of Eagle the act of the State of Delaware.

"It follows, therefore, that Eagle, in the conduct of its business, is acting in a purely private capacity. It acts as a restaurant keeper and, as such, is not required to serve any and all persons entering its place of business, any more than the operator of a bookstore, barber shop, or other retail business is required to sell its product to everyone. This is the common law, and the law of Delaware as restated in 24 Del. C., § 1501 with respect to restaurant keepers. 10 Am. Jur., Civil Rights, §§ 21, 22; 52 Am. Jur. Theatres, § 9; Williams

> v. Howard Johnson's Restaurant, 268 F. (2d) 845. We, accordingly, hold that the operation of its restaurant by Eagle does not fall within the scope of the prohibitions of the Fourteenth Amendment."

The Court holds that Section 1501 becomes operative only because the discrimination is without the Fourteenth Amendment. The determination that Eagle is not Authority's agent and thus without the Fourteenth Amendment does not depend upon a determination of the validity of Section 1501 under the United States Constitution.

While it seems clear that Section 1501 would be unconstitutional as applied to State action, this circumstance, it is respectfully submitted, does not serve to afford jurisdiction in the present case. Insofar as Section 1501 applies to private action, it is expressive of the common law. See *Williams v. Howard Johnson's Restaurant*, cited above.

Authority agrees with appellant that a statute requiring racial distinctions may in certain applications violate the Fourteenth Amendment.[3] As contended above, no such statute is here involved. In *Gayle v. Browder*,[4] this Court affirmed without opinion that ordinances of the City of Montgomery and statutes of the State of Alabama requiring segregation were unconstitutional. The United States District Court below held:

> "In their private affairs, in the conduct of their private businesses, it is clear that the people themselves have the liberty to select their own associates and the persons with whom they will do business, unimpaired by the Fourteenth Amendment. The Civil Rights Cases, 109 U. S. 3, 3 S. Ct. 18, 27 L. Ed. 835. Indeed, we think that such liberty is guaranteed by the due process clause of that Amendment."

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3. Appellant's Brief, p. 9.

4. Gayle v. Browder (U. S. D. C., Ala.) 142 F. Supp. 707, 715 (1956).

Authority notes *Brown v. Board of Education of Topeka*,[5] which holds the "separate but equal" doctrine inapplicable in the field of education, but finds no application in the premises.

It is nowhere express or implicit in the opinion below that Section 1501 is valid under the Constitution in its present application and no appeal lies under 28 U. S. C. 1257(2).

As appears from the text of the opinion below the facts of the present case are anomalous if not unique and no appropriate case for certiorari is submitted under Rule 19.

II.

The Fourteenth Amendment to the United States Constitution Is Not Applicable to Eagle's Acts.

1. The Opinion Below Does Not Depend Upon Section 1501.

As hereinafter contended at length Eagle's discrimination was private action and accordingly appellant cannot invoke the Fourteenth Amendment. Appellant tilts with windmills when he attacks Section 1501. The sole question for determination is whether state action is involved. As applied to private action the validity of Section 1501 cannot be tested on this appeal.

2. Eagle's Discrimination Is Private Action.

No control of the premises leased to Eagle is reserved to Authority either by law or the terms of the lease. The requirement that Eagle "shall occupy and use the leased premises in accordance with all applicable laws, statutes, ordinances and rules and regulations of any federal, state or municipal authority" begs rather than determines the question. If Eagle's action is private, there is no applicable law except local health and police regulations.

The record makes clear that Authority has not, in fact, exercised control over Eagle and its patronage policies.

5. Appellant's Brief, p. 9.

The thrust of appellant's argument seems to be that the relationship between Authority and Eagle as lessor and lessee suffices to make the latter's discrimination state action. At page 15 of his brief, appellant says, "That a public lessor and its lessee of government-owned realty are so related as to be mutually involved in state action is the clear rationale and result of the decided cases". This generalization falls of its own weight. In each of the cases cited, decision is based upon the peculiar facts.

Recent cases are illuminative but not dispositive because the factual aspects of the agency question are various. They are largely relevant in their distinctions. Most recent and pertinent is *Boman v. Birmingham Transit Company*, (U. S. C. A. 5) 280 F. (2d) 531 (1960). A Birmingham ordinance provided that carriers might promulgate rules and regulations for seating and that refusal to obey the same was a misdemeanor. In pursuance, bus signs directed Negroes to seat from the rear. Appeal was taken from judgment dismissing action to enjoin enforcement of the rule. The Court held that the franchised carrier was on public business. The present impact of the case is that it is determined by comprehensible principles of the law of agency.

> "• • • We fully recognize what has been known by all to be the law since the Supreme Court decided the Slaughter-House Cases, 16 Wall. 36, 83 U. S. 36, 21 L. Ed. 394, that 'the action inhibited by the first section of the Fourteenth Amendment is only such action as may fairly be said to be that of the States • • •'. Shelley v. Kraemer, 334 U. S. 1, 68 S. Ct. 836, 842, 96 L. Ed. 116. We are forced to the conclusion here that the conduct of the Bus Company 'may fairly be said to be that of the' State of Alabama through its franchising of the Bus Company and its authorizing it to adopt the rule in question enforceable by criminal sanctions."

Boman's pertinence, of course, is in its distinctions. It is clear that the ordinance in question, enacted on the day of repeal of an earlier ordinance which required separate seating for Negroes, was designed to accomplish the same result. Further, criminal sanctions were provided. The court notes, "Of course, the simple company rule that Negro passengers must sit in back and white passengers must sit in front, while an unnecessary affront to a large group of its patrons, would not effect a denial of constitutional rights if not enforced by force or by threat of arrest and criminal action. Where, as here, the City delegated to its franchise holder the power to make rules for seating of passengers and made the violation of such rules criminal, no matter how peaceable, quiet or rightful (as the Court here held) such violation was, we conclude that the Bus Company, to that extent, became an agent of the State and its action in promulgating and enforcing the rule constituted a denial of the plaintiff's constitutional rights".

In *Williams v. Howard Johnson's Restaurant*, (U. S. C. A. 4) 268 F. (2d) 845 (1959) the Court affirmed dismissal of action for refusal of a private restaurant to serve a Negro. Plaintiff contended that because the state licensed restaurants the state is under a duty to prohibit discrimination. The Court held, however, that unless the discriminations were practiced "in obedience to some positive provision of state law", they were not actionable. The Court pointed out that the licensing statute "does not authorize state officials to control the management of the business or to dictate what persons shall be served. The customs of the people of a state do not constitute state action within the prohibition of the Fourteenth Amendment".

In *Eaton v. Board of Managers of James Walker Memorial Hospital*, (U. S. D. C., N. C.) 164 F. Supp. 191 (1958), three Negro doctors for themselves and members of their class sued for admission to practice at the hospital on its so-called "courtesy staff". The hospital was estab-

lished pursuant to a public law of the State of North Carolina which authorized the City of Wilmington and New Hanover County so to do. Land was acquired—whether by eminent domain or otherwise does not appear from the report—and the City Hospital of Wilmington was built, subsequent expenses being borne forty percent by the City and sixty percent by the County. Later, Mr. James Walker offered to build a new hospital as a gift. The North Carolina legislature enacted a private law chartering the defendant Board of Managers of James Walker Memorial Hospital to manage the hospital built by Mr. Walker's gift. The express purpose of the private law was to provide management for a hospital to care for the poor of the City and County. Upon completion of the new hospital, the City and County conveyed the lands to the Board for so long as the same should be used for the purposes of the hospital as aforestated, otherwise to revert. The charter gave the Board absolute management powers. Various subsequent legislative acts provided that the City and County should make certain appropriations for the operation of the hospital and it was so financed.

The plaintiffs applied for courtesy staff privileges which entailed use of rooms and wards for their patients. They were denied admission solely because they were Negroes.

The Court stated that "the legal test between a private and a public corporation is whether the corporation is subject to control by public authority". And, "The essence of this concept is that the present ability to control carries with it the responsibility for the present action of that which can be controlled". The Court concluded its statement of the applicable legal principle as follows: "In short, the present ability to control must be determined by considering the sum total of all existing relationships between the corporation and the State". The Court concluded that the act of discrimination was not "state action".

In *Derrington v. Plummer*, (U. S. C. A. 5) 240 F. (2d) 922 (1957) cert. den. 77 Sup. Ct. 680, 353 U. S. 924,[6] Harris County, Texas maintained a courthouse in which the county leased to a private person a cafeteria equipped and furnished by the county. The courthouse had been built with public funds for the use of all citizens and the cafeteria was designed to serve their requirements. The Court held that the restauranteur's common law privilege to select clientele arbitrarily did not extend to the lessee of the cafeteria under all the facts of the *Derrington* case. The exclusion—systematic or sporadic—of Negroes by the operator of the cafeteria was held to fall within the prohibition of the Fourteenth Amendment, notwithstanding the lessor reserved no control over the lessee under the lease. However, the Court concedes at page 925 of the report of the opinion that in certain circumstances a lease could be made by the county to a private person such that the Fourteenth Amendment would have no application. The gist of the holding is that "The express purpose of the lease was to furnish cafeteria services for the benefit of persons having occasion to be in the county courthouse".

The pertinent distinction is that the object of the Eagle lease is not to afford services for patrons of the parking facility but to furnish rental income for amortization. Moreover, the parking facility, unlike the Harris County Courthouse, was not built with public funds.

Also pertinent is *Sweeney v. City of Louisville*, 102 F. Supp. 525 (1951). This was an action for declaratory judgment as to the rights of Negroes to use the facilities at Louisville's 23 public parks, which were equipped with 5 golf courses, an amphitheatre, pavilions, winter sports and a fishing lake. The action was by the individual plaintiffs for themselves and their class. One plaintiff complained he was refused golfing privileges; a second plaintiff complained no fishing; and a third plaintiff complained that the

6. Appellant's Brief, p. 17.

theatre was leased to an all-white group. As to golfing and fishing, the District Court held that the facilities furnished by the city to both races were separate but equal and that accordingly there was no violation of the Fourteenth Amendment. As to the theatre, the court held that there was no evidence that any group had been denied the use thereof on the same terms as the corporation comprised of white persons which had used the theatre. It is the theatre aspect of the *Sweeney* case which relates to the present case.

So far as appears from the report, all of the park facilities excepting the amphitheatre were operated by the city. The amphitheatre, however, was operated by a private corporation as lessee. Erected at public expense, except for $5,000.00 contributed by the private non-profit corporation, the facility was leased by the city for a term of five years to the said corporation. The pertinent features of the lease were as follows. The Lessee corporation had the sole and exclusive right of use of the premises on specified dates. The corporation had the right to sell refreshments to the public and to make reasonable charges therefor consistent with the policy of maintaining low prices. The corporation was obligated to clean the premises and furnish electricity. It was to report admission fees and attendance and other information necessary to enable the city to determine from time to time that the facility was being operated in the public interest. The corporation was further obligated to furnish statements of all receipts and expenditures. It was to recoup its $5,000.00 contribution out of the profits and pay over subsequent profits to the city. The city reserved to itself the right to make rules and regulations governing the use of the facility with the object of preserving good order, preventing immorality and the incitation of racial or religious antagonisms. The city further reserved the right to terminate the lease if it determined that the theatre was not used in the best interest of the public.

One of the plaintiffs appealed. *Muir v. Louisville Park Theatrical Association*, 347 U. S. 971, 74 S. Ct. 783 (1954).[7] The Supreme Court in a memorandum decision vacated judgment below and remanded "for consideration in the light of the Segregation Cases decided May 17, 1954, Brown v. Board of Education, etc., 347 U. S. 483, 74 S. Ct. 686, and conditions that now prevail". The gist of the *Brown* case is that the doctrine of "separate but equal" has no place in the field of public education. As noted above, the Kentucky District Court had disposed of a part of the *Sweeney* case on the ground that the city had furnished separate but equal facilities in all respects except as to the amphitheatre. As to the theatre, the court determined that no Negro group had ever sought and been refused use of the same. Thus the impact of the *Muir* decision upon this aspect of the *Sweeney* case—being the apposite aspect here—is not determined. The rejection of the separate but equal doctrine does not affect the question relative to the Louisville theatre. Actually, except insofar as the destruction of the separate but equal dogma, the *Sweeney* and *Muir* cases shed little light here. Remand by the Supreme Court for reconsideration in the light of the Segregation Cases is not tantamount to a holding that the use of the Louisville theatre by an all-white group fell within the Fourteenth Amendment. Clearly, separate but equal does not now apply to transportation and schools. However, this is not to say that a private corporation operating the theatre in the Louisville public park or that a private corporation operating a restaurant in the Authority's parking facility is within the Amendment and cannot exclude Negroes.

Eagle is a private concern. Authority reserves no control. The restaurant—and it might well have been a shoe store or other private business—was leased to afford rental income for amortization only.

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7. Appellant's Brief, p. 15.

It may be noted in passing that Louisville reserved considerable control over the corporation operating the theatre. The Authority has no such control over Eagle.

In *Nash v. Air Terminal Services, Inc.*, (U. S. D. C., Va.) 85 F. Supp. 545 (1949),[8] a Negro sued for damages allegedly resulting when she was refused service in an airport restaurant because of her race. Conceding the right of a private restaurant to refuse service, the court held that the airport restaurant was agent of the Federal Government:

> "But we do not believe the same principle of law is applicable to this defendant's restaurants at the Washington National Airport. They are operated on public property in a building constructed with public funds and under a concession from the public government. In effect, the concessionaire here is conducting the facility in the place and stead of the Federal government. To conclude otherwise would overlook not only the status and purpose of the airport, but also the purpose of the concession. It is to provide food and refreshment to the public in travel and to complement the facilities offered by the United States Government in support of air transportation. We do not hold that Air Terminal was an air carrier or engaged in air transportation; we do hold its restaurants are too close, in origin and purpose to the function of the public government to allow them the right to refuse service without good cause."

The *Nash* case in gist held that Air Terminal operated its restaurant in "the place and stead" of the Federal Government, and that absence of equal accommodations violated the Fifth Amendment.

Distinguishable are *Culver v. City of Warren*, 84 Ohio App. 373, 83, N. E. (2d) 82; *Kern v. City Commissioners*,

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8. Appellant's Brief, p. 16.

151 Kan. 565, 100 P. (2d) 709;[9] and *Lawrence v. Hancock*, (U. S. D. C., W. Va.) 76 F. Supp. 1004, all of which involved efforts to exclude Negroes by enveloping public activities in the veils of ostensibly private corporations.

Tate v. Departments of Conservation and Development, (U. S. D. C., Va.) 133 F. Supp. 53 (1955),[10] holds that leased state parks must be operated without racial discrimination. The court expressly recognized that the lease was a subterfuge to avoid the Fourteenth Amendment. *City of Greensboro v. Simkins*, (U. S. C. A. 4) 246 F. (2d) 425 (1957),[10] holds that a leased municipal golf course cannot exclude Negroes. In *Jones v. Marva Theatres, Inc.*, (U. S. D. C., Md),[10] a theatre in a city hall building, originally built as a place of public assembly, was leased to a private motion picture exhibitor. The court holds that the lessee cannot segregate Negroes in seating and toilet facilities.

Coke v. City of Atlanta (U. S. D. C., Ga.) 184 F. Supp. 579 (1960),[9] involved segregated seating in a restaurant operated by a private lessee in a city-owned airport terminal building. The court held, without disclosing its reasoning, that state action was involved. Presumably, the rationale of the *Nash* case above governed.

3. Contribution of Public Monies Is Not Material.

Within conventional modes of legal reasoning, it is not apparent what pertinence the contribution of public monies in any amount bears to the question whether state action is involved. If financing were completely by public donation, it does not follow under any rule of agency that a private lessee of a portion of the facility becomes the agent of the State as contended by appellant. Such reasoning is dangerously excursive because it is without guiding principle other than a priori conviction as to what may be

9. Appellant's Brief, p. 16.

10. Appellant's Brief, p. 15.

a socially desirable result. Authority believes that the Delaware Supreme Court stated the test for State action:

> "Fundamentally, the problem is to be resolved by considerations of whether or not the public government, either directly or indirectly, in reality, is financing and controlling the enterprise which is charged with racial discrimination. If such is the case, then the Fourteenth Amendment applies; (fo. 69) if it is not the case, the operators of the enterprise are free to discriminate as they will. Shelley v. Kraemer, 334 U. S. 1, 68 S. Ct. 842. We neither condemn nor approve such private discriminatory practices for the courts are not the keepers of the morals of the public. We apply the law, whether or not that law follows the current fashion of social philosophy." (R53)

Appellant's statement at page 17 of his brief that "Previous attempts by state governments at divesting themselves of the power to insist on nondiscrimination have been exposed and state responsibility enforced", is entirely gratuitous because it is nowhere intimated in the record that the Eagle lease was designed to permit discrimination.

CONCLUSION.

Authority respectfully concludes that this Court is without jurisdiction of the present appeal because the decision below was not based upon a determination of the validity of Section 1501 under the Constitution, but upon the finding that Eagle was not Authority's agent and no State action was involved such as to invoke the Fourteenth Amendment.

The entire relationship of Authority and Eagle is embodied and defined in their agreement of lease. It nowhere appears in the record that Eagle was Authority's agent generally or in the premises. There is no reasoned legal

basis for the conclusion that State action was here involved and the prohibitions of the Fourteenth Amendment are inapplicable.

The judgment below should be affirmed.

Respectfully submitted,

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